



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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Issue Gene

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LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Office of Personnel Management
Department of Defense
Department of State
Central Intelligence Agency

SUBJECT: Justice Department views letter on OPM draft bill to prohibit payment of annuities under any Federal retirement system to Federal employees convicted of a felony related to Federal employment.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than September 16, 1983.

Questions should be referred to Frank White (395-6156) or to Hilda Schreiber the legislative analyst in this office.

(395-4650),

9-1-83 Called ^{did not return call} (Frank White) Hilda Schreiber
at OMB and indicated
"no objection" to DOJ's
suggestions in the report. and
Enclosures

Naomi R. Sweeney
Naomi R. Sweeney for
Assistant Director for
Legislative Reference



Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 15 1983

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Stockman:

This is in response to your request for the views of the Department of Justice on the OPM draft bill to amend section 8312 of title 5, United States Code, and the State Department analysis of the captioned proposed legislation. This proposal provides that an individual may not be paid an annuity under the civil service retirement system or other retirement systems of the Government of the United States for service as a Federal employee if convicted of any felony which occurred in connection with his employment as a Federal employee and is punishable by imprisonment for two or more years. The Department of Justice has taken the position that although the OPM proposal is conceptually sound, it requires extensive reworking before it can make a meaningful contribution to the federal law enforcement program involving employee misconduct. These views, and our specific recommendations concerning areas where this proposal requires more work, are contained herein.

Summary

The law governing the disallowance of federal pensions is presently codified at 5 U.S.C. § 8312. This section provides that federal civilian annuities and military retired pay shall not be payable to employees who have been convicted of one or more criminal offenses involving treason, sabotage, or intentional breaches of the national security. In the event that an employee becomes ineligible for an annuity or retired pay by operation of this statute, the survivors and beneficiaries of that employee are also disqualified from participating in it. The present statute specifically lists the criminal offenses that lead to pension disqualification.

The bill proposed by OPM would amend section 8312 by adding to it a new subsection which, in turn, would greatly increase the number and nature of offenses that lead to disqualification for civilian annuities. Specifically, under this proposal an otherwise qualified employee would automatically lose his annuity upon

his conviction of any felony under State or federal law which is punishable by two or more years of imprisonment and which occurred "in connection with" his employment by the United States.

As with the disqualification for national security crimes presently included in section 8312, annuity disqualification under the OPM proposal would run beyond the offending employee to his beneficiaries and survivors. In addition, the annuity disqualification provided for in the OPM proposal is mandatory and, thus, a necessary consequence that automatically follows conviction of one or more of the crimes generally described. However, unlike the present disqualification law, the OPM proposal opts for a general description of disqualifying crimes rather than for a list of specific statutory offenses. Finally, unlike the present disqualification law, the proposal applies only to civilian annuities, and not to military retired pay.

Recommendation

The Department is of the opinion that there is merit to expanding 5 U.S.C. § 8312 to deny annuities and retired pay to employees convicted of specifically enumerated additional crimes, such as bribery of a public official and other offenses which reflect a breach of the public trust. However, we believe that the OPM proposal is overly broad and potentially harmful to the plea bargaining process but at the same time too narrow in its application only to civilian annuities and not to military retired pay. Therefore, we would recommend that the Department support OPM's proposal if it is modified (1) to list appropriate offenses; (2) to apply to both annuities and retired pay; and (3) to provide for the discretionary denial of annuities and retired pay, at least for certain included offenses. We would also recommend that consideration be given to amending section 8312 so that survivors and beneficiaries are not denied annuities and retired pay by reason of the offending employee's conviction of a specified offense.

Discussion

Employee crime by federal personnel is a problem demanding firm law enforcement measures. While the creation of the blanket rule proposed by OPM concerning pension forfeiture may have superficial appeal in this regard, upon closer examination it is apparent that the idea has serious flaws which, in our view, will impede rather than promote the administration of criminal justice.

As is the case with all crimes, employment-related offenses by federal personnel vary widely from case to case in their severity, in the intent with which they are committed, and in the detrimental societal consequences they cause. It is important that the federal criminal justice system retain the capacity to respond to these differences in aggravating factors. Thus, we believe that any amendment of 5 U.S.C. § 8312 should reflect

Careful consideration of the nature of the offenses that should lead to pension denial; the across-the-board approach of OPM's proposal is too inflexible.

A federal annuity often represents a lifetime's work and a significant expectation of future remuneration resulting from that work. In practical terms its deprivation under the provisions of section 8312 can constitute an extreme penalty that transcends in severity any criminal sanction which may be judicially imposed for the offenses to which section 8312 applies. The severity of the penalty is aggravated by the fact that a section 8312 disqualification applies to survivors and beneficiaries of the offending employee, whose financial security may well be severely jeopardized even though they played no part whatever in the underlying criminal conduct.

Many of the offenses falling within the scope of the OPM proposal are status crimes that involve only a minimal degree of criminal intent. Examples of such offenses are conflict-of-interest laws in the 18 U.S.C. §§ 203 through 208 series and the laws dealing with political activity within the federal service, such as 18 U.S.C. §§ 602, 603, and 607. Other offenses involve readily apparent criminal intent but often result in losses that are comparatively inconsequential and that hardly warrant such a severe sanction as forfeiture of a lifetime pension.

In those instances where a federal employee has committed a criminal offense while in office that has caused the government a considerable monetary loss, means presently exist to recover the loss through a collateral civil action following criminal conviction. Under such circumstances the conviction can be pleaded collaterally in the subsequent civil suit to prove the employee's underlying liability, and the employee's pension account may be levied against to satisfy a resulting judgment. In addition, conviction of employment-related crimes carries with it automatic exposure to termination and other adverse action proceedings pursuant to 5 U.S.C. § 7513. The government, therefore, presently has the means to remove malfeasant personnel and to levy against their pensions to the extent necessary to make the government whole for the harm their criminal conduct has inflicted. In many cases these civil remedies are a sufficient supplement to the penal sanctions that follow from a criminal conviction to vindicate the societal interests involved.

Moreover, an overly broad and inflexible rule requiring pension forfeiture under the conditions embraced by the OPM proposal will, in our view, seriously impede the Department's ability to secure guilty pleas from malfeasant employees in many cases involving felonious conduct. Few, if any, federal employees charged with the least serious felonies included within the OPM proposal will choose to relinquish their pension rights voluntarily by pleading guilty. As a result, the OPM proposal will cause a substantial increase in the number of employment-related cases that

have to be tried or disposed of through misdemeanor pleas, to the detriment of the efficient and firm administration of justice in this area.

Finally, we know of no justification for OPM's proposed expansion of 5 U.S.C. § 8312 to include additional offenses affecting civilian annuities only and not military retired pay. Section 8312 currently provides for disqualification for annuities and retired pay, as defined in section 8311, upon conviction of the listed offenses. If there is a need for expansion of section 8312 in order to deter crimes by federal employees, the same deterrent effect should be sought for members of the military. Thus, we suggest that OPM's draft bill be amended to deny both civilian annuities and military retired pay.

We would be pleased to offer our assistance to OPM to establish which particular offenses should be added to 5 U.S.C. § 8312 making pension denial applicable. As indicated, bribery of a public official is an example of an offense which should be added because of the breach in public trust which accompanies it. Certain crimes of violence against the United States, such as maliciously damaging or destroying property of the United States by means of an explosive in violation of 18 U.S.C. § 844(f), may also be appropriate for inclusion in 5 U.S.C. § 8312. In addition, employment-related narcotics trafficking offenses, such as drug sales by law enforcement agents for their personal enrichment if this conduct arises in connection with official duties, should lead to pension denial. These examples should not be considered all-inclusive since we believe there are numerous offenses which should be evaluated for addition to 5 U.S.C. § 8312.

In addition to specifying particular offenses for inclusion in 5 U.S.C. § 8312, we would also recommend making pension denial a discretionary, rather than a mandatory, result of conviction, at least for certain offenses. Mandatory disqualification may be warranted for the offenses currently listed in section 8312 and possibly for certain additional offenses, such as bribery. However, for other includable offenses which reflect a lower degree of abuse of public office, case-by-case consideration may be necessary to assess the appropriateness of pension denial. Language providing for discretionary pension denial should establish guidelines or standards applicable to a decision to deny annuities or retired pay so that an overly broad delegation of authority does not result.

Finally, if 5 U.S.C. § 8312 is to be broadened, consideration should be given to eliminating its harsh effect on survivors and beneficiaries. Denial of benefits to them by reason of the offending employee's conviction of the crimes specified directly penalizes persons other than the individual convicted of criminal activity. Disqualifying the offending employee from eligibility for a pension would appear a sufficient penalty, in addition to

the criminal and possible civil sanctions that may be imposed, to deter criminal activity by federal employees.

The State Department's comments concerning this pension proposal mirror our analysis of its weaknesses. State notes the unfairness of the effect that pension disqualification pursuant to 5 U.S.C. 8312 has on surviving spouses, and the textual imprecision of the terms "in connection with" federal employment on which OPM would have pension disqualification turn. Significantly, the State Department stresses the adverse effect that a blanket disqualification provision will have on the plea bargaining process. Finally, State notes the failure of the OPM proposal to take into account the recent changes in the federal pension program caused by this year's amendments to the Social Security Act.

While State does not oppose the OPM proposal, the thrust of their comments as we view them is that the idea needs much more study to be workable. We share these concerns.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General